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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91203730
Party	Plaintiff Zillow, Inc.
Correspondence Address	MATTHEW D SCHNELLER BRACEWELL & GIULIANI LLP 701 FIFTH AVENUE, SUITE 6200 SEATTLE, WA 98104 7043 UNITED STATES Matt.Schneller@bgllp.com, jennifer.ashton@bgllp.com, stephanie.blair@bgllp.com
Submission	Rebuttal Brief
Filer's Name	Matt Schneller
Filer's e-mail	docketing@bgllp.com, matt.schneller@bgllp.com, erin.hennessy@bgllp.com, jennifer.ashton@bgllp.com, lily.hadley@bgllp.com
Signature	/Matt Schneller/
Date	12/17/2013
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ZILLOW, INC.

Opposer,

v.

SUPER T FINANCIAL INC. dba
LOANZILLA

Applicant

Opposition No. 91203730
ZILLOW'S REPLY BRIEF

TO: Trademark Trial and Appeal Board
(via ESTTA)
P.O. Box 1451
Alexandria, VA 22313-1451

And to

Super T Financial Inc. dba LoanZilla ("Applicant") via its counsel, John Janeway of Janeway Patent Law PLLC, 2208 NW Market St., Ste. 508, Seattle, WA 98115, solely via e-mail at john@janewaypatentlaw.com and marianne@janewaypatentlaw.com, as agreed by the parties.

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ZILLOW’S REPLY BRIEF

Opposer Zillow Inc. (“Opposer” or “Zillow”) hereby files its Reply Brief, responding first to certain evidentiary matters and second to certain legal arguments raised in the brief of Super T Financial Inc. dba Loanzilla (“Applicant” or “LoanZilla”).

I. Evidentiary Matters

A. Annual Reports

Where the parties have not stipulated to their admissibility, the Board held in 2010 that electronic publications like “websites, advertising, business publication, *annual reports*, and more” were admissible – even if a non-electronic print copy of that same annual report would not be. *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 and n. 18 (TTAB 2010) (emphasis added). Here, the Annual Reports are indisputably admissible per the parties’ stipulation, and the broad rule from *Safer* need not even be applied. *See* Applicant’s Brief, Docket #29, p. 9.

Once a document is admitted into evidence, a party must verify factual claims therein through “testimony.” *Safer*, 94 USPQ at 1039; *Coach Services Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713, 1718 (Fed. Cir. 2012) (where a printed annual report was not admissible under notice of reliance or under a stipulation, the court noted that (a) had the report been admitted, the data therein could have been simply confirmed via testimony and (b) the same information could have come in through testimony establishing that same information; in that case, neither occurred).

Since the annual reports here were already verified as authentic and admissible, in contrast to *Coach*, all that remained was for a knowledgeable individual to verify the factual information in the annual reports. That is exactly what happened.

Zillow’s mortgage marketing director, Erin Lantz, testified (a) that she is in charge of

Zillow's mortgage-related business, (b) that she was knowledgeable about Zillow's business overall, (c) that she was knowledgeable about figures related to users of Zillow's services,¹ (d) that she was knowledgeable about Zillow's finances,² and (e) confirmed the accuracy of the statements in the admissible, authentic annual reports related to these areas. Dep. of E. Lantz, p. 3-4, 13, and 24, Docket # 20. Dep. of E. Lantz, p. 3-4, 13, and 24, Docket # 20. Since the documents were already admissible per the parties' stipulation, Ms. Lantz did not need to specifically view each in order to authenticate them. That step is required only if the document itself is not already admissible.

Ms. Lantz's assertions that she is knowledgeable about Zillow's business, about user figures of its services, and about Zillow's finances, and her confirmation of figures related to those areas in the 2011 and 2012 annual reports are all uncontroverted and are totally consistent with her senior business role at Zillow, and they must be accepted by the Board. Applicant could have pressed Ms. Lantz further as to the basis for her knowledge of these topics in the deposition, but did not do so.

Finally, there is no requirement that the deponent "prepare" the financial information in question to testify to it, just that the deponent be "knowledgeable" about the information in question. See, e.g., *Nautica Apparel, Inc. v. Carlucci*, Opp. No. 91165909 (TTAB Dec. 18, 2007), at p. 17, available at <http://e-foia.uspto.gov/Foia/ReterivePdf?system=TTABIS&flNm=>

¹ Since every one of the over one hundred million property pages on Zillow include (a) estimated property valuations (b) mortgage estimates and (c) other mortgage-related information, and Ms. Lantz is in charge of Zillow's overall mortgage business, Ms. Lantz must necessarily keep up to date about current and historical overall user data to be able to manage the mortgage business. See, e.g., Dep. of E. Lantz, p. 9 and 14, Docket # 20 ("So if it was a for sale home, it would have all the details of that property, plus the list price, plus the mortgage, estimated mortgage payment that we would calculate based on that list price.")

² In addition, Applicant does not contend that there is any reason to doubt the financial statements are inaccurate. The annual reports are, on their face, independently audited by Ernst & Young LLP. Knowing or willful certifications of false statements in these reports could subject the signing chief executive officer and chief financial officer to criminal sanctions of up to \$5,000,000 and up to twenty years in prison. 18 U.S.C. § 1350.

[91165909-12-18-2007](#) (crediting testimony from opposer's trademark manager as to sales and advertising figures from annual reports, and finding NAUTICA mark famous).³

B. Newspaper articles

Applicant argues that there is no evidence of record of newspaper articles referring to Zillow after 2011. Applicant submitted numerous examples of unpaid media attention about Zillow in the mortgage and real estate fields as evidence of the fame of the Zillow mark prior to the application date for the LoanZilla mark on May 10, 2011. This evidence of “intense media attention” to the senior mark prior to the filing date of the Application is “convincing” evidence of fame. *Research in Motion Ltd. v. Defining Presence Marketing Group Inc.*, 102 USPQ2d 1187, 1192-93 (TTAB 2012) (finding BLACKBERRY mark famous prior to the filing date of CRACKBERRY applications, and sustaining oppositions). Zillow was clearly famous in 2011 prior to the filing date of the Application, and has only grown since. There was no point to burdening the record, and the Board, with even more articles to further emphasize Zillow's ongoing prominence and continuing growth.

II. Analysis of the *du Pont* Factors

Opposer submits that its analysis of each of the *du Pont* factors in its main brief are significantly more persuasive than Applicant's analysis on each point. However, several points in Applicant's brief require specific comment.

³ Indeed, Trademark Board proceedings are too long and costly as is. From a policy concern, it would be counterproductive for the Board to impose a new, higher requirement to verify financial information contained in annual reports that are already verified by an independent auditor and that are verified by senior employees on pain of criminal sanctions. Requiring a separate, expensive deposition from someone who prepared audited financial statements instead of accepting the sworn statements of high-level employee who has stated under oath that she is familiar with those financial statements and that has testified to their accuracy would be unnecessarily burdensome and expensive.

A. There are No Other Marks of Record Containing the Letter String ZILL in the Mortgage, Real Estate, or Financial Services Fields

The Applicant's arguments on the first and sixth *du Pont* factors boil down to noting that lots of third party marks contain the string "zilla." Unfortunately for Applicant, none of Applicant's examples are either in the mortgage field (occupied by Zillow and encroached upon by LoanZilla), in the real estate field (solely occupied Zillow), or in the financial services field more generally. The sixth factor is the "number and nature of similar marks in use *on similar goods*," *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (emphasis added), and Applicant's evidence confirms that there are *no* similar marks in use on products or services in the mortgage or real estate fields. This emphasizes how strongly both the first and sixth *du Pont* factors favor Zillow, and how broad the scope of protection enjoyed by the Zillow mark truly is in the mortgage and real estate fields.

B. Zillow and LoanZilla both Provide Mortgage-Related Products and Services

Applicant spends a substantial amount of time discussing the relationship between real estate-related services and mortgage brokerage services. The relationship between Zillow's real estate-related services and mortgage services is self-evident – a key question for property purchasers is how to pay for the property, and the answer is almost always a mortgage – but it's a secondary concern.

The uncontroverted facts show that the Zillow mark was used for and famous for a wide range of mortgage-related services, including mortgage quotes from third-party mortgage brokers, well prior the Application date, and that Zillow owns registrations that explicitly cover these services, Reg. No. 4201269.⁴ Many earlier registrations cover providing "information in

⁴ Opposer clearly pled its use of and thus its common-law rights in the mark for all products and services from the first use dates claimed in all or its applications and registrations, including what is now Reg. No. 4201269, and proven this priority through substantial evidence. Notice of Opposition ¶¶ 6-8, 26.

the field of real estate” and advertising services related to other “consumer services,” both of which have included financial and mortgage information from the date the Zillow site and services launched. *See, e.g.*, Reg. Nos. 337691 and 3437690.

It is unquestioned that Zillow offered extensive information about mortgages, and mortgage rates, and included a directory of mortgage professionals, including mortgage brokers and lenders, years prior to the filing date of the Application. Dep. of E. Lantz, p. 23, Docket #20, and Ex. B, F, G, H, and K thereto. It is also uncontested that that Zillow launched the “Zillow Mortgage Marketplace,” in 2008, expanding its services to allow users to receive competitive mortgage quotes from third party mortgage brokers through Zillow. *See* Dep. of E. Lantz, p. 18, Docket #20, and Ex. F (ZILL000272-73, PDF p. 89); “How to Use Zillow Mortgage Marketplace,” ZILL000553-54, Docket #16 (PDF p. 252). This launch and the services have been widely covered by prominent media such as the Chicago Tribune, the New York Times, the Los Angeles Times, and many more. *See, e.g.*, Docket # 17, PDF p. 93-102. It is unquestioned that the Zillow Mortgage Marketplace has grown from processing nearly 100,000 loan requests per month in 2008 to processing over 1.6 million loan requests per month in April 2013. Dep. of E. Lantz, p. 28, Docket #20. Taken together, there is no question that the Zillow mark is a famous, strong, and highly protectable mark in the mortgage space.

It is unquestioned that Applicant in fact “us[ed] the [Zillow] website for loan quotes” and “considered advertising on the [Zillow] site.” LoanZilla’s Responses to Rogs. 34 and 35, Docket # 17 (PDF p. 206-07).

That the Applicant is a mortgage broker, and that Applicant is a marketplace for mortgage brokers rather than a broker itself, are irrelevant for this analysis. Consumers can approach either Applicant or Opposer to search for mortgage information and to identify a

mortgage provider, and mortgage brokers like Applicant provide millions of mortgage quotes to potential customers each month by advertising through the Zillow Mortgage Marketplace. The parties' services are in part competitive and in part very closely related, and this factor strongly favors Zillow.

C. The Channels of Trade and Consumers for Applicant's Services are Identical to the Channels of Trade and Consumers for Zillow's Services.

Applicant concedes that Applicant in fact "us[ed] the [Zillow] website for loan quotes" and "considered advertising on the [Zillow] site." LoanZilla's Responses to Rogs. 34 and 35, Docket # 17 (PDF p. 206-07). While Applicant itself apparently decided not to do so, mortgage brokers commonly advertise through Applicant's site, and tens of millions of rate quotes from mortgage brokers have been provided through the Zillow Mortgage Marketplace services. Dep. of E. Lantz, p. 27-28, Docket #20. Applicant's arguments that the parties' channels of trade or potential customers are different, or that consumers searching for mortgage quotes are somehow immune from confusion, are completely contradicted by the actual behavior of mortgage brokers and by Applicant's plans for its own businesses. These factors strongly favor Zillow.

D. Applicant Misunderstands the Ninth *du Pont* Factor.

The Applicant attempts to construe the ninth *du Pont* factor – the variety of goods on which a mark is or is not used – as looking at third-party marks. The ninth factor focuses on the range of goods or services offered by the senior user. *See, e.g., In re Wilson*, 57 USPQ2d 1863, 1867 (TTAB 2001) (the "registrant uses its PINE CONE mark on a variety of different fruits and vegetables"); *Time Warner Entertainment Co. v. Jones*, 65 USPQ2d 1650, 1663 (TTAB 2002) (the ninth factor weighs in favor of the opposer, which "has licensed its Road Runner marks for use on a large number of diverse products"). Here, Zillow uses its mark on a wide range of

mortgage and real-estate-related goods and services in five International Classes, and the ninth factor strongly favors Zillow.

E. Bad Faith is a Fact to Consider Under the Thirteenth *du Pont* Factor and is not a Claim.

The Applicant argues that Zillow is “untimely” trying to add a “claim” of bad faith. As noted in the Zillow’s Brief, the Board may, under the thirteenth *du Pont* factor, infer Applicant’s bad faith intent to trade on the substantial goodwill the Zillow Marks by its adoption of a very similar mark that is used for closely related services, given its admitted knowledge of Zillow’s rights prior to adopting a confusingly similar identifier *and* given its stated intent to be the “Experia” of the online mortgage field – a company founded by many of Zillow’s senior executives. This is not an additional claim, just an extra data point under the thirteenth *du Pont* factor pointing to why the Board should refuse registration of the Application.

III. Conclusion – the LoanZilla Application Should Be Refused.

For all the reasons noted above and all the reasons noted in Zillow’s Brief, the Board should refuse registration of the LoanZilla mark for mortgage brokerage services on the basis of Opposer’s undisputed prior use of and registrations for the famous mark Zillow for online mortgage quotation services, which provided consumers over 1.6 million mortgage quotes from mortgage brokers each month as of April 2013, and for Zillow for real estate information services, which were accessed by over 34 million unique users each month as of December 2012. There are no other parties that use the shared letter string “Zill” in the mortgage or real estate fields, and the famous Zillow mark enjoys abroad scope of protection. Judgment should be entered in favor of Zillow, and registration of the Application should be refused.

DATED: December 17, 2013.

CERTIFICATE OF SERVICE

I hereby certify that this, ZILLOW'S
REPLY BRIEF, is being submitted via e-
mail to counsel for Applicant on December
17, 2013, as agreed by the parties: John
Janeway, Janeway Patent Law PLLC,
john@janewaypatentlaw.com and
marianne@janewaypatentlaw.com.

Signature: /Matt Schneller/

BRACEWELL & GIULIANI LLP

By: /Matt Schneller/
Matt Schneller
Erin S. Hennessy
Jennifer Ashton
Attorneys for Zillow, Inc.
701 Fifth Avenue, Suite 6200
Seattle, WA 98104-7043
Telephone: (206) 204-6200
Fax: (206) 204-6262